Mohd Ali Jaafar v Public Prosecutor

HIGH COURT (MELAKA) — CRIMINAL APPEAL NO 42–18 OF 1997
AUGUSTINE PAUL J
30 JULY 1998

Criminal Law *— Attempting to obtain sexual favours — What amount to attempt — Interruption in completion of crime — Whether preparation to commit crime go beyond an attempt — Prevention of Corruption Act 1961 ss 3(a)(ii) & 4(a)*

Criminal Procedure *— Sentence — Mitigation — Use of agent provocateur in commission of crime — Whether operate as mitigating factor in sentencing*

Evidence *— Tape recording — Admissibility — Whether authenticity of recordings have been proved beyond reasonable doubt — Whether trial within a trial is necessary to admit tape recording in evidence — Whether tape recordings were wrongly admitted in evidence*

The appellant was found guilty by the sessions court judge ('the judge') for soliciting sexual favours from the complainant at the Immigration Office, Melaka under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') — the first charge — and for attempting to obtain sexual favours from her under s 4(a) of the Act — the second charge. He was convicted on both the charges and sentenced to three years' imprisonment in respect of the first charge and 1½ years' imprisonment in respect of the second charge. The appellant appealed against the convictions and sentences imposed. The appeal was confined to the following grounds: (i) the admissibility of several tape recordings and transcripts adduced at the trial; (ii) that the oral evidence adduced was insufficient to support a conviction even if the tape recordings were admissible; and (iii) whether on the facts of the case there was an attempt to obtain sexual favours with regard to the second charge.

Held, quashing the conviction and sentence on the first charge; and affirming the conviction on the second charge:

(1) The authenticity of the recordings had not been proved beyond reasonable doubt. Therefore, the tape recordings were wrongly admitted in evidence by the judge. As the conviction of the appellant on the first charge was anchored on the recorded evidence, it could not be sustained. Accordingly, the conviction and sentence on the first charge were quashed (see p 229E).

(2) There was sufficient evidence to show that the appellant had attempted to obtain sexual favours from the complainant. There were steps taken towards the actual commission of the offence. Therefore, the prosecution had proved beyond reasonable doubt that the appellant attempted to obtain sexual favours from the complainant (see p 232C–D).

(3) The use of an agent provocateur in the commission of a crime may operate as a mitigating factor in sentencing an accused person. The part played by the complainant in this case ought to operate as a mitigating factor in favour of the appellant. The sentence on the second charge was therefore reduced to one of six months' imprisonment (see p 232E–H); *R v Sang* [1980] AC 402 followed.

Obiter:

(1) It is irregular to hold a trial within a trial in order to admit a tape recording in evidence. However, a trial within a trial is required to admit a tape recording if its admissibility is subject to conditions like, for example, voluntariness (see p 223H–I). The proof of a tape recording, being a document within the meaning of s 3 of the Evidence Act 1950, is governed by ss 61 to 66 of the same Act pursuant to which the recording must be proved by being produced for the inspection of the court or by secondary evidence. Thus, the tape recording must be played over in court before it can be admitted in evidence. When the tape recording is played in court, the voices and the accuracy of the conversation must be proved (see p 224A–B, G).

(2) To ask for a bribe is an attempt to obtain one. This is because when the request for a bribe is complied with, it results in the commission of the offence of obtaining a bribe. Thus what was done up to that stage would amount to an attempt. The asking of the bribe had therefore gone beyond the stage of preparation. It follows that any interruption in the payment of the bribe after the request for it has been agreed will go beyond an attempt as it is in the process of the commission of the offence of obtaining a bribe itself. The applicable law would be the same when the offence charged with is an attempt to obtain sexual favours. Thus, all that the prosecution need to prove in such a charge is that the accused asked for a sexual favour explicitly or implicitly after having had the intention to ask for it and having made preparations for it (see p 231F–H); *Empress of India v Baldeo Sahai* [1879] 2 All 253 followed.

[Bahasa Malaysia summary

Perayu telah didapati bersalah oleh hakim mahkamah sesyen ('hakim tersebut') kerana mengajak pengadu untuk mengadakan hubungan seksual di Pejabat Imigresen, Melaka di bawah s 3(a)(ii) Akta Pencegahan Rasuah 1961 ('Akta tersebut') — tuduhan pertama — dan kerana cuba untuk mendapatkan hubungan seksual daripadanya di bawah s 4(a) Akta tersebut — tuduhan kedua. Beliau telah disabitkan atas kedua-dua tuduhan dan telah dijatuhkan hukuman pemenjaraan selama tiga tahun bagi tuduhan pertama dan 1½ tahun

bagi tuduhan kedua. Perayu telah merayu terhadap sabitan-sabitan serta hukuman yang dikenakan. Rayuan terhad kepada alasan-alasan yang berikut: (i) kebolehterimaan beberapa rakaman pita dan transkrip yang dikemukakan di perbicaraan; (ii) bahawa keterangan lisan yang dikemukakan adalah tidak memadai untuk menyokong satu sabitan walaupun jika rakaman-rakaman tersebut boleh diterima; dan (iii) sama ada berdasarkan fakta-fakta kes terdapatnya percubaan untuk mendapat hubungan seksual berhubung dengan tuduhan kedua.

Diputuskan, membatalkan sabitan dan hukuman atas tuduhan pertama dan mengesahkan sabitan atas tuduhan kedua:

(1) Keesahan rakaman telah tidak dibuktikan melampaui keraguan munasabah. Dengan itu, rakaman pita tersebut telah diterima sebagai keterangan secara salahnya oleh hakim. Oleh kerana sabitan perayu atas tuduhan pertama bergantung pada keterangan yang dirakamkan, ia tidak boleh dipertahankan. Berikutan itu, sabitan dan hukuman ke atas tuduhan pertama dibatalkan (lihat ms 229E).

(2) Terdapat keterangan yang mencukupi untuk menunjukkan bahawa perayu telah cuba untuk mendapatkan hubungan seksual daripada pengadu. Langkah-langkah telah diambil bagi melakukan kesalahan itu sebenarnya. Dengan itu, pihak pendakwa telah membuktikan melampaui keraguan munsabah bahawa perayu telah cuba untuk mendapatkan hubungan seksual daripada pengadu (lihat ms 232C–D).

(3) Penggunaan agent provocateur dalam melaksanakan sesuatu perbuatan jenayah mungkin beroperasi sebagai faktor peringanan dalam menghukum seseorang yang tertuduh. Peranan yang dimainkan oleh pengadu dalam kes ini seharusnya beroperasi sebagai faktor peringanan yang memihak kepada perayu. Dengan itu, hukuman atas tuduhan kedua telah dikurangkan kepada pemenjaraan selama enam bulan (lihat ms 232E–H); *R v Sang* [1980] AC 402 diikut.

Obiter:

(1) Adalah di luar aturan untuk mengadakan perbicaraan di dalam suatu perbicaraan agar dapat memasukkan rakaman pita sebagai keterangan. Walau bagaimanapun, perbicaraan di dalam suatu perbicaraan adalah diperlukan untuk memasukkan rakaman pita jika kebolehterimaannya tertakluk kepada keadaan-keadaan seperti, contohnya, 'voluntariness' (lihat ms 223H–I). Bukti rakaman pita, sebagai suatu dokumen di dalam lingkungan maksud s 3 Akta Keterangan 1950, dirangkumi oleh ss 61 hingga 66 Akta yang sama selaras dengan yang mana rakaman tersebut semestinya dibuktikan dengan dikemukakan untuk pemeriksaan mahkamah atau melalui keterangan sekunder. Dengan itu, rakaman pita tersebut semestinya dimainkan dalam mahkamah

A sebelum ia boleh dimasukkan sebagai keterangan. Apabila rakaman pita itu dimainkan dalam mahkamah, suara dan ketepatan perbualan semestinya dibuktikan (lihat ms 224A–B, G).

(2) Meminta rasuah adalah percubaan untuk mendapatkannya. Ini adalah kerana apabila permintaan untuk mendapatkan rasuah B dipatuhi, ia mengakhibatkan terlaksananya kesalahan mendapatkan rasuah. Dengan itu, apa yang telah dilakukan sehingga peringkat itu akan membawa kepada suatu percubaan. Pemintaan rasuah telah dengan itu melampaui peringkat penyediaan. Ini bermakna bahawa sebarang gangguan dalam pembayaran rasuah itu selepas permintaan bagi mendapatkannya C dipersetujui akan melampaui percubaan kerana ia di dalam proses melakukan kesalahan mendapatkan rasuah itu sendiri. Undang-undang yang terpakai adalah sama apabila kesalahan yang dituduh merupakan suatu percubaan untuk mendapatkan hubungan seksual. Dengan itu, apa yang perlu dibuktikan oleh pihak D pendakwa dalam tuduhan sedemikian adalah bahawa tertuduh telah meminta untuk mendapatkan hubungan seksual secara eksplisit atau secara tersirat selepas mempunyai niat untuk meminta bagi mendapatkannya dan setelah membuat persediaan baginya (lihat ms 231F–H); *Empress of India v Baldeo Sahai* [1879] 2 All 253 diikut.]

E

Notes

For cases on mitigation, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2513–2523.

For cases on admissibility of tape recording, see 7 *Mallal's Digest* F (4th Ed, 1995 Reissue) paras 1612–1615.

Cases referred to

Aziz bin Muhamad Din v PP [1997] 1 CLJ Supp 523 (refd)
G *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 (refd)
Choi Kit Kan v R [1980] HKLR 433 (refd)
Conwell v Tapfield [1981] 1 NSWLR 595 (refd)
Empress of India v Baldeo Sahai [1879] 2 All 253 (folld)
Ghazali bin Salleh & Anor v PP [1993] 3 CLJ 638 (refd)
Lee Look v PP [1985] 1 MLJ 240 (refd)
H *PP v Yong Kong Hin* [1981] 2 CLJ 178 (refd)
R v Chen [1993] 2 VR 139 (refd)
R v Cotroni [1979] 2 SCR 256 (refd)
R v MacLean and MacLean (1979) 49 CCC (2d) 399 (refd)
R v Maqsud Ali [1965] 2 All ER 464 (refd)
I *R v Parsons* (1977) 80 DLR (3d) 430 (refd)
R v Robson [1972] 2 All ER 699 (refd)
R v Sang [1980] AC 402 (folld)
R v Stevenson [1971] 1 All ER 678 (refd)
Rama Reddy v VV Giri AIR SC 1162 (refd)

Tan Khee Koon v PP [1995] 3 SLR 724 (refd)
Teja Singh & Anor v PP [1950] MLJ 71 (refd)
Teoh Hoe Chye v PP [1987] 1 MLJ 220 (refd)
Thiangiah & Anor v PP [1977] 1 MLJ 79 (refd)
Williams v The Queen [1982] Tas R 274 (refd)

Legislation referred to

Evidence Act 1950 ss 3, 61–66
Penal Code (FMS Cap 45) s 161
Penal Code s 161 [India]
Prevention of Corruption Act 1961 ss 3(a)(ii), 4(a)

V Rajadevan (*M Kunasegaran* with him) (*Rajadevan & Associates*) for the appellant.
Nasri bin Mohd Daud (Deputy Public Prosecutor) for the respondent.

Augustine Paul J: In this case, the appellant was found guilty by the learned sessions court judge at Melaka for soliciting sexual favours from one Iee Bee Fong ('the complainant'), a female, on 17 June 1995 at 12pm at the Immigration Office, Melaka under s 3(a)(ii) of the Prevention of Corruption Act 1961 ('the Act') and for attempting to obtain sexual favours from her on 17 June 1995 at 8.30pm at the Tip Top Guest House ('the guesthouse') under s 4(a) of the Act. He was convicted on both the charges and sentenced to three years' imprisonment in respect of the first charge and one and a half years' imprisonment in respect of the second charge. This appeal is by the appellant against the convictions and sentences imposed.

The facts of the case

On 7 June 1995, the complainant went to the Immigration Department at Melaka to renew her Restricted Malaysia-Singapore and International Passports. Her passport did not have the required stamp for having entered Singapore. She met the appellant who told her that not having the stamp on the passport is an offence. She asked him for help as it was her first offence and that she did not know that it was wrong. He then told her to renew her restricted passport first and meet him later at the office canteen. When she did not find him, there she met him in his office. He interviewed her again. She again asked him for help. He wrote his handphone, house and office telephone numbers on a white card and gave it to her saying that she could contact him through any one of those numbers. When she received the card from him, she again asked him for help. As she said in her evidence:

> Selepas saya terima kad itu, saya masih minta pertolongan daripada tertuduh dan tertuduh menjawab: 'Saya telah pun memberi banyak 'tips' kepada anda tapi awak masih tidak dapat faham lagi'. I then asked him in English, 'Why can't you be straightforward?' Tertuduh: 'Tak boleh terus terang sangat'. Tertuduh kata dia menolong saya cukup dengan membuat temu bual itu. Kemudian dia suruh saya panggil dia. Lepas itu saya pun balik.

A She added that she forgot to mention in the earlier part of her evidence that the appellant had asked her '... adakah awak suka keluar dengan saya'. To a question as to what gave her the impression that the appellant wanted sexual favours from her, she said:

> Daripada soalan 'adakah awak suka keluar dengan saya' dan dengan cara-
B cara dia bercakap dengan saya dan dengan senyuman dia dan cara dia pandang saya.

On 10 June 1995, she made a report to the Anti-Corruption Agency ('the BPR') at Melaka. On the evening of that day, one Ong Cheng Hian ('PW5'), an officer from the BPR, came to her house. He fixed a tape
C recorder to her telephone and asked her to call the appellant. She narrated a part of the conversation which is as follows:

> Saksi: Bila boleh dapat pasport saya?
>
> Tertuduh: Sabarlah. Mahu ingin ajak saya keluar.
>
> Saksi: Bagaimana pasport saya? (Saya ajak tertuduh keluar ke
D coffeehouse di Hotel Ramada pada 8.30 petang pada hari itu sahaja.)

She then went to the Ramada Hotel with a concealed tape recorder provided by the BPR. When the accused arrived, both of them went to the coffeehouse of the hotel. While there she asked him whether he had
E brought her passport. He told her to be patient and asked her the manner of booking a room in the hotel. She told him to find out from the receptionist. He found that the hotel was fully booked. When she refused his request to follow him to the guesthouse, he asked her to go out with him in a weeks' time and asked her to call him.

F On 17 June 1995, she went to the BPR office at about 10am and phoned the appellant at his office. PW5 fixed a tape recorder to the telephone. She then narrated a part of the conversation which runs as follows:

> Encik Ali (tertuduh) kata 'Hello Darling!'
>
G Saksi: Saya tanya Encik Ali kah?
>
> Encik Ali (tertuduh): Ya.
>
> Saksi: Bagaimana dengan pasport saya?
>
> Encik Ali (tertuduh): Sabar.

On the evening of the same day, she telephoned the appellant from her
H house. PW5 recorded the conversation. As she said in her evidence:

> Saya dapat bercakap dengan tertuduh. Saya tanya dia macam mana nak pergi ke Top Ten. Lepas itu ada banyak percakapan. Lepas itu tertuduh tanya boleh bagi saya dulu — saya tanya bagi apa — tertuduh jawab bagi main apalagi.

I The appellant gave her directions on how to go to the guesthouse. They were to meet there at 8.30pm. Before going to the guesthouse, the complainant went to the BPR office. She was asked by the BPR officers not to be worried as they will be at the scene. She then took a taxi to the

meeting place. She waited at the car park of the guesthouse for the appellant. He appeared from behind her and was near the staircase of the guesthouse. He signalled with his head asking her to go upstairs. Before she went up, she saw BPR officers around there. That made her courageous to go up. As the appellant went upstairs, she followed him. When she reached the top of the stairs, she saw him holding a key. When he was about to tell her something, he was arrested. She was then taken out from there to the BPR office.

The prosecution tendered in evidence three tape recordings. The first (exh P5A(ii) was recorded in 10 June 1995 at 6.35pm), the second (exh P5A(iii) on 17 June 1995 at 12.00pm) and the third (exh P5A(iv) on 17 June 1995 at 6.00pm). With regard to exh P5A(ii), PW5 said that he fixed a tape recorder to a telephone in the complainant's house. He tested the recorder and found it to be in good condition. He then inserted a new tape into the recorder. He switched on the recorder and uttered the following introductory words:

> Saya, Ong Cheng Hian, pembantu siasatan akan membuat rakaman percakapan telefon antara Iee Bee Fong dengan Mohd Ali bin Hj Jaafar di rumah alamat 8499-C Pulau Gadong berhubung dengan Melaka Tengah Repot No 2626/95. Panggilan telefon dibuat daripada no telefon 354542 kepada 513770 jam lebih kurang 6.35 petang.

After the conversation between the complainant and the appellant, PW5 uttered the following closing words into the recorder:

> Saya, Ong Cheng Hian, pembantu siasatan menghentikan alat perakam jam lebih kurang 6.45 petang.

He then broke the safety tab on the tape and wrote the report number, date and time on the tape. He also initialled on it. He then played back the tape to confirm that the recording had been made. After that he took back the tape to his office and kept it in his cabinet. On 12 June 1995, he was instructed to make a copy of the tape and also to make a transcription of what had been recorded. After having made a copy of the tape, he put it in an envelope and sealed it. He then kept it in his cabinet and locked it. The key has been with him at all times. On 26 June 1995, he handed the original tap to the investigation officer, En Zainuddin bin Hussein ('PW6'). He used the copy of the tape to make the transcript.

Exhibit P5A(iii) was recorded at the BPR office. PW5 told the complainant that if the appellant invited her to go out she was to find out the time and place of the meeting. He then connected the tape recorder to a telephone there. He tested the recorder and found it to be working. He switched on the recorder and uttered the introductory words which I have reproduced earlier. The complainant then spoke to the appellant. At the end of the conversation, PW5 uttered the closing words which I have reproduced earlier and switched off the tape recorder. However, he forgot to disconnect the induction socket and these words were not in the transcript. He removed the tape from the recorder and broke its safety tab. He then wrote the report number, time and date on the tape. He also

initialled on it. He they played the tape and found that the conversation had been recorded. After that he kept the tape in his cabinet and locked it. On 19 June 1995, he took out the tape to make a copy and transcript of it.

Exhibit P5A(iv) was recorded in the complainant's house. PW5 connected a tape recorder to the telephone in her house and instructed her to ask the appellant for the location of the guesthouse and to arrange the meeting for 8.30pm He then tested the recorder and found it to be in good condition. He then inserted a new tape into the recorder and uttered the introductory words. After the end of the conversation, he uttered the closing words as before and switched off the recorder. He removed the tape and broke the safety tab. He made some entries on the tape and kept it in his cabinet. On 19 June 1995, he took out the tape to make a copy. He then kept the original tape in an envelope and sealed it. He kept it in his cabinet. He made a transcript of it on 22 June 1995. He said that he handed all the tapes to the investigation officer on 26 June 1995 who returned them to him on the day before the trial. PW6 confirmed that PW5 handed all the tapes to him on 26 June 1995 and that they were in his custody till the trial of this case when he handed them back to PW5.

The tapes were played in court to enable the complainant to identify the voices in them. Exhibit P5A(ii) was first played and the transcript, exhibit P5A(ii)(T), was referred to her. She identified the person introducing himself as Ong Cheng Hian as PW5. She identified Voice(1) in the transcript as that of the appellant and Voice(2) as hers. She confirmed that the voice of the male in the tape is that of the appellant and that the voice of the female is hers. She said that the voice at the end of the tape is that of PW5. She also said that what is written in the transcript is correct after having compared it with the tape recording. Exhibit P5A(iii) was also played. She could not identify Voice(1) and Voice(3). She identified Voice(2) as hers and Voice(4) as that of the appellant. She said that the contents of the transcript are correct after having compared them with the tape recording. Similarly she identified the voices in exhibit P5A(iv). She identified PW5's voice. She said that Voice(1) is that of the appellant while Voice(2) is hers. She said that the transcript is correct after having compared it with the tape recording. Side B of exh P5A(iv) was also played. She identified PW5's voice and said that Voice(1) is that of the appellant while Voice(2) is hers. She said that the transcript is correct after having compared it with the tape recording. Exhibit P5A(iii) was played to Mohd bin Abdullah (PW8), an immigration officer, at the BPR office prior to the commencement of the trial. He identified Voice(1) as that of Norizan bte Abdul Wahab (PW7), an administrative officer attached to the Immigration Department, Melaka, and Voice(2) as that of the caller. He said that Voice (3) is his while Voice (4) is that of the appellant. With regard to the date when the tape was played to him, he said in cross-examination that it was one day after the receipt of the telephone call. In re-examination, he said that he was at the BPR office during office hours, that is, on 18 June 1995, a Sunday. Exhibit P5A(iii) was played to PW7 in court. She said that Voice(1) is hers, Voice (2) is that of the caller while Voice(3) is that of PW8. She was unable to identify Voice(4).

The grounds of judgment of the learned sessions court judge A

The learned sessions court judge outlined the sequence of events that led to the recordings. He said that the recording of the conversation (exh P5A(iii)) on 17 June 1995 at 12.00pm is the most important as it forms the subject matter of the first charge. He considered the objection raised by the defence on the break in the chain of custody of the tapes B and said:

> As regards the recording (P5A(iii)) made on 17 June 1995 at 12.00 noon, the learned defence counsel contended that PW8 En Mohd bin Abdullah, an immigration officer, who received the call from the complainant and handed the phone to the accused stated in cross examination that he heard C the tape recording (P5A(iii)) at the BPR office, one day after he received the call and the tape (P5A(iii)) was played to him by a Malay BPR officer. Counsel contended that this officer should have been called.
>
> PW8 was called for the purpose of identifying the voice of the accused in court. PW8 received the call from the complainant on 17 June 1995 at about 12.00 noon, which was a Saturday, and hence the next day 18 June D 1995 was a Sunday, which was a non-working day in the state of Malacca. He also clarified in re-examination that he went to the BPR office during office hours. As such, PW8 could only have gone to the BPR office (sic) on Monday 19 June 1995. Encik Ong has given evidence that on 19 June 1995, he did take out the original tape (P5A(iii)) to make a copy for the purpose of transcription. The original was not used for fear that it may get damaged. E
>
> In these circumstances, I accept Mr Ong's evidence that the original tape was kept by him and that if PW8 was called for voice identification at the BPR office, he only heard the replay of the copy.
>
> Based on the evidence above, the court is satisfied with the safekeeping of the tapes and accordingly rule out any possibilities of tempering (sic) F with the tapes.

He then referred to the evidence adduced by the prosecution on voice identification and said:

> The voice of the accused was clearly identified by the complainant as well as by the working colleague of the accused En Mohd and is acknowledged G as Voice(4) in the said transcription. The voice identification was made easy by the very clear recording of the voices and the conversation on tape. The same applied to the other tapes produced.

On the accuracy of the recording he said:

> The complainant and the two voice identifying witness have confirmed the H accuracy of the recording. The tape was played in their presence in court and checked with the transcript as to the identity of the voices and as to the conversation. In addition, I have heard the tapes myself and am completely satisfied with the accuracy of their recordings.

On the quality of the recording, he said: I

> As stated above, the recording was good in that the conversations were clearly audible and intelligible. As such En Ong was able to transcribe the conversations verbation.

A The learned sessions court judge then summarised the evidence given by the complainant with the regard to the first charge. He set out the facts leading up to 17 June and said:

> On this date at about 12.00 noon, the complainant called the accused at his office, under the direction of the BPR. The conversation between the
B complainant and accused was recorded and the tape was produced as exh P5A(iii) and the translation (sic) as P5A(iii)(T).

He then proceeded to analyse extracts from the transcript to support the element of soliciting to be proved by the prosecution and said:

> The above mentioned tape conversation has shown beyond all reasonable
C doubt that the accused had made an unequivocal request to have sexual intercourse with the complainant and this was the precondition for her passport to be processed.

With the regard to the second charge, the learned sessions court judge first dealt with the law relating to an attempt. He referred to *T Munirathnam*
D *Reddy* AIR 1955 AP 118 to say that the crucial test is whether the last act if uninterrupted and successful would constitute an offence. He said that it is for the prosecution to show that the appellant intended to commit the offence, that is, to have sexual intercourse with the complainant as an inducement to act in relation to his principal's affairs. He said that the act of soliciting for sexual favours had been proved. The complainant agreed
E to it under the instructions of the BPR. Hence, he said, as far as the appellant was concerned, all that he had to do was to give the time, date and place to obtain the sexual favour. Accordingly, the appellant had arranged to meet the complainant at the guesthouse on 17 June 1955 at 8.30pm. The appellant arrived at the appointed time and place and met
F the complainant and took her up to the hotel. The learned sessions court judge then continued:

> Now, all that remained to be done was for the accused to take the object of his desire into a room and to act out his fantasy and the offence of obtaining sexual gratification would have been complete. But, unfortunately for the accused, before he could usher the complainant into a room, and continue
G with his intention of committing the crime, things went beyond his control, in that he was interrupted by the BPR officers and arrested. The last act of the accused need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.
>
> In conclusion, on the facts of this case and having regard to the nature of the offence to be committed, it is my finding that the accused had
H embarked on a course of conduct which is nothing less than an attempt to commit an offence under s 4(a) of the Prevention of Corruption Act 1961.

The learned sessions court judge found that the complainant was an agent provocateur and, in reliance on *Teja Singh & Anor v PP* [1950] MLJ 71, ruled that her evidence does not require corroboration. He said that even
I if her evidence requires to be corroborated it has been materially corroborated by the tape recordings.

When the defence was called, the appellant elected to make an unsworn statement from the dock. It was the case for the defence that it was the

complainant who kept pestering the appellant about her passport and who asked him out. The appellant was labouring under the impression that the complainant was keen to be his friend. It was for this reason that he met the complainant at the guesthouse to have a chat with her and to get to know her better. He obtained a room key for this purpose. He denied making any demand for sexual favours from her as a precondition for approving her passport. The learned sessions court judge said that the tape recordings proved that the appellant did solicit for sexual favours and that the conversation recorded on 17 June 1995 at 12 noon completely demolished his defence. He found that with regard to the second charge, the appellant had admitted that he met the complainant at the guesthouse when he said:

> Untuk mengenalinya dengan lebih rapat. Pada masa itu saya sesungguhnya percaya bahawa Iee Bee Fong mahu berkenalan rapat dengan saya.

The learned sessions court judge said that the defence had not raised any reasonable doubt and thus found the appellant guilty on both the charges.

The grounds of appeal

Learned counsel for the appellant said that his submission will be confined to the following three grounds:

(a) the admissibility of the tape recordings and the transcripts;

(b) that the oral evidence adduced must be sufficient to support a conviction even if the tape recordings are admissible; and

(c) whether on the facts of the case there was an attempt to obtain sexual favours with regard to the second charge.

I shall deal with grounds (a) and (b) together.

THE ADMISSIBILITY OF THE TAPES AND WHETHER THE ORAL EVIDENCE ADDUCED MUST BE SUFFICIENT TO SUPPORT A CONVICTION WITHOUT THE TAPED EVIDENCE

The submission of the parties

In his submission, learned counsel for the appellant contended that the chain of custody of the tape recordings has not been established by the prosecution. He said that this must be affirmatively proved and, in support, referred to *Ghazali bin Salleh & Anor v PP* [1993] 3 CLJ 638 where Abdul Malik Ishak JC (as he then was) said at p 644:

> Since the tape-recorded conversation is susceptible to interference, and can be easily altered, there must be evidence to show that it is well guarded. The essence of any safeguard which is at once real and understandable seems to lie in physically guarding the disc or tape as soon as a recording has been made on it; and making sure that it is under guard until it is needed for a lawful occasion or until it is brought to the court.

A In support of his argument, he referred to the evidence of PW5 who said that all the tapes were locked in his cabinet on 17 June 1995 and that he took them out only on 19 June 1995. Yet PW8 said that a tape was played to him on Sunday 18 June 1995 at the BPR office during office hours. Learned counsel said that the learned sessions court judge had erred in assuming that what PW8 meant was that he heard the tape on 19 B June 1995. He said that there is no evidence to show that it was PW5 who handed the tape to PW8 who merely said that a Malay BPR officer played the tape to him. In saying that the failure to call this officer as a witness is fatal, learned counsel relied on *Teoh Hoe Chye v PP* [1987] 1 MLJ 220. He then said that the complainant did not confirm in her evidence that the C contents of the tapes are a true account of the conversation she had with the appellant. He said that she ought to have given oral evidence on the contents of the tapes. He further said that her evidence cannot be supplemented by the taped evidence which can be used only for purposes of corroboration. He then referred to *Aziz bin Muhamad Din v PP* [1997] 1 CLJ Supp 523 where it was held that the question of corroboration does D not arise unless the evidence of the witness requiring corroboration is itself credible. Learned counsel also objected to the preparation of the transcript by PW5 as he is an interested witness in the light of the role that he played in this case. In his reply, the learned deputy public prosecutor said that even though there is no evidence to show who handed the tape to PW8 the E evidence of PW5 shows that the tapes were always in his custody. He also referred to the steps taken by PW5 to ensure the safe custody of the tapes. With regard to the defence objection that the contents of the tapes were not confirmed by the complainant, the learned deputy public prosecutor said that the tapes were played to her in court. On the proper use of a tape recording as evidence, the learned deputy public prosecutor said that it F can be used as primary evidence.

The law

Before proceeding any further it is perhaps necessary for me to deal with G the procedure governing the manner of tendering a tape recording in evidence as the learned sessions court judge, after having observed that there are no clear authorities on this issue, admitted the tape recordings at the end of the case for the prosecution without holding a trial within a trial. Though the trilogy of English cases of *R v Maqsud Ali* [1965] 2 All ER 464, *R v Stevenson* [1971] 1 All ER 678 and *R v Robson* [1972] 2 All ER H 699 appear to imply that a trial within a trial ought to be held in order to admit a tape recording in evidence, the proper procedure to be followed cannot be said to have been clearly established in those cases. In *Maqsud Ali*, the Court of Criminal Appeal made it clear that as far as a trial within a trial is concerned, the issue clearly raised is whether evidence such as I statements are voluntary or, if voluntary, whether they were obtained in conformity with the judges' Rules. The court further added that the learned trial judge ' ... was pressed to undertake an inquiry into the weight of the evidence and although reluctant at first, he ultimately agreed to do

so'. The court also said that it was rare for a judge to undertake an investigation into the weight of the evidence. Be that as it may, the court recognized the fact that there can be cases where the issue of admissibility and weight can overlay each other and that:

> ... this was one of those rare cases in which the judge was justified in doing what he did.

The inquiry conducted by the learned trial judge may be justified on the peculiar facts of that case. It was one of those very rare occasions when an English court was confronted with a language which was totally alien to it. Thus *Maqsud Ali* is no authority for suggesting that the holding of a trial within a trial is a prerequisite for the admissibility of a tape recording in every case. In *Stevenson*, Kilner Brown J held a trial within a trial to determine the admissibility of a tape recording. However, his Lordship made it clear that, as a general rule, the procedure adopted was undesirable and said at p 680:

> ... Nevertheless, as a general rule, it seems to me to be highly undesirable, and indeed wrong for such an investigation to take place before the judge. If it is regarded as a general practice it would lead to the ludicrous situation that in every case where an accused person said that the prosecution evidence is fabricated the judge would be called on to usurp the function of the jury.

In *Robson*, Shaw J expressed dissatisfaction in holding a trial within a trial to determine the admissibility of a tape recording and said at p 701:

> In the first stage, when the question is solely that of admissibility — ie is the evidence competent to be considered by the jury at all? — the judge, it seems to me, would be usurping their function if he purported to deal with not merely the primary issue of admissibility but with what is the ultimate issue of cogency. My own view is that in considering that limited question the judge is required to do no more than to satisfy himself that a prima facie case of originality has been made out by evidence which defines and describes the provenance and history of the recordings up to the moment of production in court. If that evidence appears to remain intact after cross-examination, it is not incumbent on him to hear and weigh other evidence which might controvert the prima facie case. To embark on such an enquiry seems to me to trespass on the ultimate function of the jury.

However, having expressed such a view, his Lordship proceeded to say that '... for the purposes of this case ...' he accepted the proposition that he ought to conduct a comprehensive inquiry into not only the history of the tapes but also their nature and condition.

It would thus seem that Kilner Brown J and Shaw J reluctantly followed the procedure laid down in *Maqsud Ali*, perhaps, out of deference to a decision of the Court of Criminal Appeal. In *Choi Kit Kan v R* [1980] HKLR 433, Roberts CJ in outlining the procedure to be followed when a tape recording is tendered in evidence said at pp 437–438:

> I have not been able to find any clear statement of the procedure which should be adopted. I hope therefore, that what follows may be of assistance to magistrates before whom it is sought to introduce evidence based upon

> tape recordings. If, on the face of it, there is nothing improper in the manner or circumstances of the making of a recording, the magistrate should call for and examine the transcript. Before permitting the tape to be played, the magistrate should consider the transcript and decide whether the evidence contained in it would be admissible on general principles. He must also decide whether, in the exercise of his discretion, he should exclude it although if it is strictly admissible, eg if the prejudicial effect of the material would greatly outweigh its evidential value. If the magistrate rules that the tape recording is admissible, it should be played, in order that the witness who is to identify the voices thereon may do so. That witness may in carrying out this task, be permitted to refer to the transcript and to confirm that it appears to represent what transpired on the recorded occasion ... If, however, it is alleged that the tape has been tampered with, it would be proper to require the witness to give his recollection of the recorded conversation before the tape is played or he is allowed to refer to the transcript. Otherwise this is not necessary.

The above passage does not refer to the need to hold a trial within a trial to decide on the admissibility of a tape recording. In the Canadian case of *R v Parsons* (1977) 80 DLR (3d) 430, the Ontario Court of Appeal after having reviewed the English authorities held that evidence to show the integrity, accuracy and continuity of the tapes was relevant and admissible and there was no need of hearing it on a voir dire. Dubin JA said in the course of his judgment:

> The Crown's proof as to the integrity of the tape, its accuracy, its continuity and voice identification and that there has been no tampering nor alterations in any way all relate to the proof that the evidence tendered is an accurate reproduction of what it is alleged the person against whom it is tendered said. The weight to be given to that evidence is for the jury and the admissibility of such evidence is not subject to any statutory condition precedent, and should be dealt with in the same manner as any other issues of fact which arise in every jury trial. ...
>
> Evidence that the recording tape upon which the conversations were recorded was magnetically clean, that the recording apparatus was in working order, that the tapes upon which the recordings were made had not been tampered with nor altered in anyway would appear to be initially admissible, and thus would not normally be the subject of a voir dire. Similarly, the evidence tendered to establish 'voice identification', unless subject to some specific exclusionary rule would appear to be initially admissible.

In my view, therefore, it is irregular to hold a trial within a trial in order to admit a tape recording in evidence. It is admissible upon being tendered through its maker after proof of the matters referred to in *Parsons*. The maker would be the person who participated in the recorded conversation. In this case, it would be the complainant. To hold a trial within a trial to determine such matters would, as Kilner Brown J said in *Stevenson*, lead to the ludicrous situation that in every case where it is alleged that the prosecution evidence is fabricated such an inquiry would have to be undertaken. However, a trial within a trial is required to admit a tape recording if its admissibility is subject to conditions like, for example, voluntariness.

The proof of a tape recording, being a document within the meaning of s 3 of the Evidence Act 1950, is governed by ss 61 to 66 of the same Act pursuant to which the recording must be proved by being produced for the inspection of the court or by secondary evidence. Thus the tape recording must be played over in court before it can be admitted in evidence. In determining the admissibility of a tape recording, it is necessary to bear in mind what it is that is being sought to be admitted. This was aptly described in *Butera v Director of Public Prosecutions* (1987) 164 CLR 180 where Mason CJ, Brennan and Deane JJ said at pp 185–186:

> That is not to say that the tape is itself the admissible evidence of what is recorded on it. A tape is not by itself an admissible object for by itself it is incapable of proving what is recorded on it: It is admissible only because it is capable of being used to prove what is recorded on it by being played over. By using sound reproduction equipment to play over the tape, the court obtains evidence of the conversation or other sound which is to be proved; it is that evidence, aurally received, which is admissible to prove the relevant fact.

I also refer to *Conwell v Tapfield* [1981] 1 NSWLR 595 where Street CJ said at p 598:

> What is the best evidence of the sounds entrapped in the record? It seems to me that there can be only one answer to this question, namely the best evidence is the reproduction of those sounds as sounds when the record is played by appropriate sound reproducing equipment. Much of the confusion that has crept into the cases stems from the fact that normally it is the human voice that is recorded and, when reproduced, this is commonly done in writing. But if, say, the relevant evidence was a screech of tyres before a collision and that had been recorded, there would be no denying that the best method of placing this evidence before the court would be by playing the record. There is not the slightest difference in basic principle where the recorded sound is the human voice.

When the tape recording is played in court, the voices and the accuracy of the conversation must be proved. It is not necessary that there must be evidence to show that the taped conversation on which the prosecution seeks to rely was heard by any person (see *R v Chen* [1993] 2 VR 139). It can constitute primary evidence (see *Rama Reddy v VV Giri* AIR SC 1162). It was in this circumstance that the Court of Criminal Appeal held that the tapes were admissible in *Maqsud Ali* (see also *R v Cotroni* [1979] 2 SCR 256). In *Maqsud Ali*, conversations between two accused persons in custody were secretly recorded by the police by a hidden microphone. The accused spoke in a foreign language which the police did not understand and which, in any event, they were unable to hear. The content of the recorded conversation was duly proved and the accused were convicted notwithstanding that there was no other evidence to implicate them. The conviction was upheld. A tape recording can also be used to corroborate the oral testimony of a witness.

It is perhaps appropriate at this stage to consider the matters that must be established when introducing evidence of a tape recording. They are as follows:

(a) the tape was run through and found to be clean before the recording was made;

(b) the machine was in proper working order;

(c) the tape was not tampered with or altered in any way — it should be established in whose possession the tape was at all times;

(d) the officers (or other witnesses) played the tape over after making the recording and heard voices which they can identify;

(e) a transcript was prepared of the voices; if it was just taken down in shorthand and the typed transcript prepared from the shorthand notes then the notes should be saved;

(f) the officers (or other witnesses) played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation.

(See *Canadian Criminal Evidence* (3rd Ed) by PK McWilliams QC at pp 7–10).

In addition, the following precautionary steps taken by PW5 ought to be followed:

(1) uttering of the introductory and closing words;

(2) breaking of the safety tabs after the recording; and

(3) placing identification marks on the tapes.

Proof of identity of the conversation which comes within the ambit of item (f) above is the most important element to be established when introducing evidence of a tape recording. In *ZB Bulkhari v BR Mehra* AIR 1973 SC 1788, it was held that the accuracy of what was actually recorded had to be proved by the maker of the record (see also *Maqsud Ali*). It is desirable that a witness who participated in a conversation that has been recorded gives an oral account of it. He may refer to the taped conversation to refresh his memory (see *R v Mills* [1962] 3 All ER 298). Alternatively, he must at least confirm that the tape recording is of a conversation which occurred if for some reason or other he is unable to give an oral account of the conversation. If there is no evidence to show that it is an accurate account of a conversation that occurred, then it is not admissible. In my opinion, the absence of such proof means that the tape recording sought to be admitted in evidence is in the same position as a document being tendered in evidence without proper proof of execution. In *R v Chen*, the Supreme Court of Victoria considered the evidence that must be led in introducing a tape recording and said that it depends on the circumstances of each case. Marks, Southwell and Harper JJ in delivering the judgment of the court added at p 150:

> The test is whether there is sufficient material before the court to allow the tribunal of fact acting reasonably to conclude that the recorded sounds reproduce those originally made by the persons identified by the evidence. In other words, there must be evidence, which the tribunal of fact is entitled to accept, *that the recording is of a conversation which occurred* and which would be admissible if proved by oral testimony. In our opinion, admissibility

> does not depend on the party tendering the tapes having removed absolutely any chance that they are inaccurate. (Emphasis added.)

I agree with this view as evidence to show that the recording tendered is an accurate reproduction of a conversation which occurred would remove any doubt that the recording is inaccurate due to failure to fully establish the other matters that are required to be proved.

The findings of the court

I shall now consider the six matters, as listed in an earlier part of the judgment, that ought to have been established by the prosecution in tendering the tape recordings in evidence.

The tapes were run through and found to be clean before the recordings were made

The object of this element is to ensure that the quality of the recording is good. No evidence was adduced by the prosecution to show that the tapes were run through and found to be clean before the recordings were made. However, PW5 said that with regard to exhs P5A(ii) and (iii) the tapes used were new ones. This, to my mind, is sufficient to show that the tapes were clean before the recordings were made. PW5 did not give such evidence with regard to exh P5A(iii). Neither did he give any evidence to show that he took steps to ensure that it was clean before the recording was made. Be that as it may, there is evidence to show that all the recordings were clear and audible. Accordingly, the learned sessions court judge found that the quality of the recordings were good. That, in my view, ensures compliance with the requirement of this element. I therefore hold that this element has been proved with regard to all the exhibits.

The machine was in proper working order

PW5 gave clear evidence to show that he tested the tape recorder on all the occasions the recordings were made and that he found it to be in good condition. This element has therefore been proved with regard to all the exhibits.

The tapes were not tampered with or altered in any way

In order to establish this element there must be evidence to show the persons in whose custody the tapes were at all times. Exhibit P5A(ii) was recorded on 10 June 1995 while exhs P5A(iii) and (iv) were recorded on 17 June 1995. The prosecution has led sufficient evidence to establish that there was no break in the chain of custody of exhs P5A(ii) and (iv). With regard to exh P5A(iii) PW5 said that after it was recorded on 17 June 1995 he kept it in his cabinet and locked it. He then took it out on 19 June 1995 to make a copy of it. He did not say what he did with it after that till

A 26 June 1995 when he handed it to PW6. This tape was played to PW8 for purposes of voice identification one day after it was recorded. He said that he was in the BPR office for this purpose during office hours on 18 June 1995, a Sunday. The learned sessions court judge found that PW8 must have gone to the BPR office on Monday 19 June 1995 as 18 June 1995 was a Sunday with no working hours and that: '... En Ong has given evidence B that on 19 June 1995, he did take out the original tape (P5A(iii)) to make a copy for the purpose of transcription. The original tape was not used for fear that it may get damaged. In these circumstances, I accept Mr Ong's evidence that the original tape was kept by him and that if PW8 was called for voice identification at the BPR office, he only heard the replay of the C copy.' In my opinion, the finding of the learned sessions court judge is unsupported by the evidence adduced as PW5 only said that he made a copy of the tape to make a transcript. No evidence was adduced to show that what PW8 heard was a replay of the copy. Thus the finding of the learned sessions court judge is based on mere speculation. In my view, the confusion created by the date on which PW8 heard the tape or whether D what he heard was a copy of it is insignificant. What is relevant is the manner in which the tape came into the possession of the BPR officer who played it to PW8. That would ensure continuity in the chain of custody of the tape. PW5 ought to have been examined on this vital issue. Evidence ought to have been adduced to show that he handed the tape or a copy of E it to a BPR officer and then took it back. This officer ought to have been called as a witness. The prosecution has therefore failed to establish how and when the tape moved into the hands of the BPR officer who played it to PW8 and the person in whose custody it was from 19 June 1995 to 26 June 1995 when it was handed to the investigation officer. There is therefore a break in the chain of custody of exh PSA(iii).

F

Witnesses played the tapes over after making the recordings and heard voices which they can identify

The playing over of a tape after the recording must be to a person who can G identify the voices. On the facts of this case, this can only be done by the complainant as she was the person who participated in the conversation that was recorded. The only evidence on this issue is that of PW5 who said that, in the case of exhs P5A(ii) and (iii), he played the tape after the recording to confirm whether the conversation had been recorded though there was no such evidence with regard to exh P5A(iv). In my opinion, this H evidence does not meet the requirement of this element which has therefore not been proved with regard to all the exhibits. In my opinion non-compliance with the requirement to identify the voices immediately after the recording is not fatal if it has been sufficiently done so at the trial. However, such an identification made immediately after the recording and I at the trial will serve to remove any allegation of tampering with the recording. The voices in the recordings have been sufficiently identified at the trial.

The preparation of the transcripts

The transcripts of the recordings were prepared by PW5. The learned sessions court judge heard the tapes being played in court. He said that the recordings were good and the conversations were clearly audible. As such, he said, PW5 was able to transcribe the conversations verbatim. The finding, to my mind, cannot be faulted. In my opinion, the preparation of the transcripts by PW5 is not fatal. It must be noted that a transcript is admissible not as evidence of the conversation or other sounds recorded but as a means of assisting in the perception and understanding of the evidence tendered by the playing over of the tape (see *Williams v The Queen* [1982] Tas R 274; *R v MacLean and MacLean* (1979) 49 CCC (2d) 399). Thus the preparation of a transcript cannot be equated with the recording of a cautioned statement by an officer who has played an active part in an investigation which has been held to be wrong (see *PP v Yong Kong Hin* [1981] 2 CLJ 178; *Lee Look v PP* [1985] 1 MLJ 240). Unlike the recording of a cautioned statement, any bias shown in the preparation of a transcript can be easily noticed as the recording is played in court with the transcript being compared with it. As the accuracy of the transcript is open to anyone for inspection, its preparation by a person who was involved in the investigation of the case is not objectionable per se. In any event, there was no challenge to the accuracy of the transcript during the trial.

Witnesses played over the recordings and checked them with the transcripts as to the identity of the voices and as to the conversation

This element involves two ingredients which must be established by the prosecution by playing over the recording.

First, the recordings must be played over to the witnesses who can check with the transcript as to the identity of the voices. As I said earlier, the identification of the voice of the appellant by the complainant must first be done immediately after the recording. This must be followed by a playing over of the recording in court to the witnesses who can check with the transcript as to the identity of the voices. The evidence adduced shows that the voices in the tapes have been sufficiently identified in court by checking them with the transcripts.

Second, the recordings must be played over to the witnesses who can check with the transcript as to the identity or accuracy of the conversation. This ingredient requires proof that the recording played in court is the conversation that occurred. The only witness who could have confirmed the conversation in the tapes with the transcripts was the complainant. She did not give oral evidence of the conversations she had with the appellant. She also did not go on record to say that the recordings that she heard in court represent the conversations that she had with the appellant. Her evidence only goes to show that the transcripts of the recordings were correct after having compared them with the playing of the tapes in court. Such evidence can be given by any witness who hears the tapes being

played without having been a party to the conversation. The learned sessions court judge's finding on this element is as follows:

> The complainant and the two voice identifying witnesses have confirmed the accuracy of the recording. The tape was played in their presence in court and checked with the transcript as to the identity of the voices and as to the conversation. In addition, I have heard the tapes myself and am completely satisfied with the accuracy of their recordings.

With respect, the learned sessions court judge has failed to appreciate the difference between the quality and the accuracy of a tape recording. Having been not a party to the recorded conversation he is in no position to express satisfaction with the accuracy of the recordings. He can only comment on the quality of the recording. His finding is therefore wrong in law.

Thus the recordings played in court have not been proved to be the conversations that took place between the complainant and the appellant. In other words no evidence was adduced to show that the recordings were of conversations which occurred. If there had been such evidence, the weaknesses in the evidence relating to the recordings which I have highlighted earlier would not have had a serious effect on the admissibility of the recordings. The authenticity of the recordings have therefore not been proved beyond reasonable doubt. I therefore hold that the tape recordings were wrongly admitted in evidence by the learned sessions court judge. As the conviction of the appellant on the first charge is anchored on the recorded evidence, it cannot be sustained. Accordingly, I quash the conviction and sentence on the first charge.

WHETHER THERE WAS AN ATTEMPT TO OBTAIN SEXUAL FAVOUR

The submission of the parties

In his submission, learned counsel for the appellant, in saying that there are four stages in every crime, referred to *Thiangiah & Anor v PP* [1977] 1 MLJ 79 where Ajaib Singh J (as he then was) said at p 81:

> There are four stages in every crime. First, an intention to commit the crime, secondly the preparation for its commission, thirdly the attempt to commit it and finally the actual commission of the crime.The mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of s 511 of the Penal Code. If the attempt succeeds the crime is completed, the offender will face a charge for the substantive offence. On the other hand a crime is not completed if something should happen when the attempt to commit it is being made breaking the chain of events which if not for the intervening interruption would have led to the commission of the crime. In such an event, the offender will be liable under s 511 of the Penal Code.

> Stephen's time honoured definition of an attempt is valid and strong as ever today: 'An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts, which would constitute its actual commission if it were not interrupted'.

Learned counsel said that the arrest of the appellant in this case was premature. As the arrest was only at the stage of preparation he said that the appellant had not committed any offence. His submission would therefore mean that the appellant would be guilty of attempting to obtain sexual favours from the complainant only if he had been interrupted while in the physical act of attempting to obtain the favours. In his submission, the learned deputy public prosecutor said that the prior arrangement made by the appellant with the complainant to meet at the guesthouse followed by him asking her to go up and the collection of the room key by him showed that there was an attempt to obtain sexual favours.

The law

The word 'attempt' has not been defined in the Act. In my opinion, the definition formulated in *Thiangiah* would be of equal application to an attempt under s 4(a) of the Act (see *Tan Khee Koon v PP* [1995] 3 SLR 724). Of the different stages in the commission of a crime, the distinction between preparation and attempt is a thin one. The test for determining the distinction between the two stages is described in the *Law of Crimes* by Ratanlal (24th Ed) at p 2523 in the following terms:

> The test for determining whether the acts constitute attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. But where the thing done is such as, if not prevented by an extraneous cause, would fructify into a commission of the offence, it would amount to an attempt to commit an offence. An attempt to commit an offence does not cease to be an attempt merely because after the attempt is made and before the actual completion of the offence the offender may be able to prevent its completion by doing some other act in pursuance of a changed intention.

The circumstances in which there is an attempt to obtain a gratification can be discerned from the Indian case of *Empress of India v Baldeo Sahai* [1879] 2 All 253. That case involved a charge for attempting to obtain a gratification under s 161 of the Indian Penal Code which is similar to s 161 of our Penal Code and which in turn is similar to s 4(a) of the Act. Briefly stated, the facts of the case are that the accused was employed as a clerk in the Pensions Department. In an interview with an applicant for a pension, the accused after referring to his own influence in the department and instancing two cases in which by that influence increased pensions had been obtained, proceeded to intimate that anything might be effected by payment, and on the overture being rejected, declared that the applicant would rue and repent the rejection of it. He was charged for attempting to obtain a bribe. He was convicted by the magistrate. On appeal, he was acquitted by the sessions judge on the ground that the acts of the accused were not acts committed towards the commission of the offence of

attempting to obtain an illegal gratification, but acts preparatory towards the commission of such offence, and that consequently the accused could not be convicted of such offence.

On further appeal, the High Court affirmed the conviction. Spankie J said that intention to commit the offence was present in the mind of the accused. He made preparations to carry out the intention. He then attempted to carry out his intention. Pearson J said in his supporting judgment at pp 720–721:

> The view of the sessions judge, that 'the accused has not committed any act towards the commission of the offence,' and that 'all that he has done is only preparatory to the commission of the offence,' is erroneous. It may be that the accused in sending for Abbas Ali and showing him the anonymous petition and exh B and making him aware of their contents was only paving the way for the commission of the offence in question. But when, after referring to his own influence in the office and instancing two cases in which by that influence increased pensions had been obtained, he proceeded to intimate that anything might be affected by *Kar-rawai*, and on the overture being rejected, concluded by declaring that Abbas Ali would rue and repent the rejection of it, the accused was actually offering inducements for the purpose of obtaining a bribe. *To ask for a bribe is an attempt to obtain one; and a bribe may be asked for as effectually in implicit as express terms.* As soon as he had caused Abbas Ali to understand that he was willing to render him a service for a bribe, the offence of attempting to obtain a bribe was consummated, and the sessions judge is wrong in holding that it was not consummated, but that the accused might have foregone his intention of committing it. (Emphasis added.)

I wholeheartedly agree with *Baldeo Sahai* that to ask for a bribe is an attempt to obtain one. This is because when the request for a bribe is complied with, it results in the commission of the offence of obtaining a bribe. The commission of the offence is interrupted when the request for a bribe is refused. If there had been no refusal, the offence would have been completed by the payment. It cannot also be said that the act done prior to the interruption is completely harmless. Thus what was done up to that stage would amount to an attempt. The asking of the bribe has therefore gone beyond the stage of preparation. It follows that any interruption in the payment of the bribe after the request for it has been agreed will go beyond an attempt as it is in the process of the commission of the offence of obtaining a bribe itself. In my opinion, the applicable law would be the same when the offence charged with is an attempt to obtain sexual favours. Thus, all that the prosecution need to prove in such a charge is that the accused asked for a sexual favour explicitly or implicitly after having had the intention to ask for it and having made preparations for it.

The finding of the court

I have already set out in some detail the facts that led to the complainant meeting the appellant at the Immigration Office, Melaka on 7 June 1995 for the purpose of renewing her passports. When she asked him for help, he asked her to meet him at the canteen. When she could not find him there, she met him at his office. When she again asked him for help he said

that he had given enough tips and gave her his contact telephone numbers. The appellant asked her to go out with him and it was her impression that he wanted sexual favours from her. On 17 June 1995, when the complainant phoned the appellant, he addressed her as 'darling'. He wanted to meet her. On the evening of the same day when she telephoned him at his house, he asked her for a sexual favour. The intention in asking for sexual favours can be seen from what the appellant told the complainant on the first day and the preparatory stage of the offence is evidenced by the fact that he gave her his contact telephone numbers and kept on delaying giving her any reply on the position of her passport. When she called him on the evening of 17 June 1995, he asked her for the sexual favour. This is sufficient to show that he had attempted to obtain sexual favours from her. Whatever happened thereafter are steps taken towards the actual commission of the offence. The appellant's defence does not raise any reasonable doubt in the case for the prosecution as described by the learned sessions court judge.

Thus I agree with the finding of the learned sessions court judge, though through a different process of reasoning, that the prosecution has proved beyond reasonable doubt that the appellant attempted to obtain sexual favours from the complainant and therefore confirm the conviction of the appellant on the second charge. With regard to the sentence imposed I am of the opinion that the learned sessions court judge has not taken certain relevant matters into consideration. The use of an agent provocateur in the commission of a crime may operate as a mitigating factor in sentencing an accused person. In support I refer to *R v Sang* [1980] AC 402 where Lord Salmon said at p 443:

> My Lords, it is now well settled that the defence called entrapment does not exist in English law: *Reg v McEvilly* 60 Cr App R 150, *Reg v Mealey* 60 Cr App R 59. A man who intends to commit a crime and actually commits it is guilty of the offence whether or not he has been persuaded or induced to commit it, no matter by whom. This being the law, it is inconceivable that, in such circumstances, the judge could have a discretion to prevent the Crown from adducing evidence of the accused's guilt — for this would amount to giving the judge the power of changing or disregarding the law. It would moreover be seriously detrimental to public safety and to law and order, if in such circumstances, the law immunized an accused from conviction. *There are, however, circumstances in which an accused's punishment in such a case might be mitigated, and sometimes greatly mitigated.* (Emphasis added.)

In my opinion, the part played by the complainant in this case ought to operate as a mitigating factor in favour of the appellant. I therefore reduce the sentence on the second charge to one of six months' imprisonment.

Conviction and sentence on the first charge quashed. Conviction on the second charge affirmed and sentence reduced.

Reported by Loo Lai Mee